

Guidelines for prosecutors on assessing the public interest in cases affecting the media

Issued by the Director of Public Prosecutions on 13 September 2012

Introduction

1. Freedom of expression and the right to receive and impart information are recognised and protected both under the common law and by the Human Rights Act 1998. Prosecutors are therefore required to take these rights into account when making decisions which may affect the exercise of these rights.
2. These guidelines set out the approach that prosecutors should take to such decisions where they affect the media and, in particular, how prosecutors should approach the question of whether a prosecution is required in the public interest. They are designed to give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police or other investigators in these sensitive and difficult cases. Adherence to these guidelines will ensure that there is consistency of approach across the CPS. However, they do not cover possible breaches of reporting restrictions or contempt of court, which are dealt with in other guidance and policy.
3. These guidelines are likely to be relevant when prosecutors are considering whether to charge journalists with criminal offences that may have been committed in the course of their work as journalists. They are also likely to be relevant when prosecutors are considering whether to charge others whose interaction with journalists may have involved the commission of a criminal offence.
4. It is important that prosecutors are aware that neither journalists nor those who interact with them are afforded special status under the criminal law. The Code for Crown Prosecutors which is issued by the Director of Public Prosecutions and which governs CPS decision-making applies to journalists and those who interact with them in the same way as it applies to everyone else.
5. These guidelines replace the interim guidelines issued on 18 April 2012 and have immediate effect.

General Principles

6. Prosecutors may only start a prosecution if a case satisfies the test set out in the Code for Crown Prosecutors. This test has two stages: the first is the requirement of evidential sufficiency and the second involves consideration of the public interest.
7. As far as the evidential stage is concerned, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. This means that an objective, impartial and reasonable jury (or bench of magistrates or judge sitting alone), properly directed and acting in accordance with the law, is more likely than not to convict. It is an objective test based upon the prosecutors assessment of the evidence (including any information that he or she has about the defence).
8. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

9. It has never been the rule that a prosecution will automatically take place once the evidential stage is satisfied. In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.

10. Every case must be considered on its own individual facts and merits. No prospective immunity from criminal prosecution can ever be given and nothing in these guidelines should be read as suggesting otherwise.

11. In the vast majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed. However, there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these cases, prosecutors may decide that the case should not proceed further.

Principles of special application in cases affecting the media

12. In cases affecting the media where freedom of expression and the right to receive and impart information are in issue, prosecutors are required to apply a number of specific principles in addition to the general principles set out above. Therefore, in such cases, prosecutors must follow the Code and they must also follow these guidelines.

13. It is important at the outset to distinguish between:

- (a) The public interest served by freedom of expression and the right to receive and impart information, and
- (b) The separate question of whether a prosecution is in the public interest, which is the second stage of the Code test.

Freedom of expression and the right to receive and impart information

14. Freedom of expression and the right to receive and impart information are recognised and protected both under the common law and by the Human Rights Act 1998. They are most clearly set out in Article 10 of the European Convention on Human Rights, which provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...".

15. As the European Court of Human Rights has made clear, freedom of expression and the right to receive and impart information are an essential foundation of a democratic society and are accordingly afforded considerable weight. In *Sunday Times v UK (No.2)* [1992] 14 EHRR 123, it was said that:

"Freedom of expression constitutes one of the essential foundations of a democratic society ...it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also as to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions convincingly established.

"These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such

information and ideas: the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog."

16. However, freedom of expression and the right to receive and impart information are not absolute rights. They may be restricted but only where a restriction can be shown to be both:

necessary and
proportionate.

Since the bringing of a criminal prosecution is capable of being a restriction of these rights, prosecutors must consider these requirements carefully in every case.

Taking freedom of expression and the right to receive and impart information into account at the evidential stage

17. Cases affecting the media where freedom of expression and the right to receive and impart information are in issue may cover a variety of offences. Those most likely to be under consideration are set out in Annex A. Prosecutors are reminded that for certain offences the consent of the Attorney General or the Director of Public Prosecutions is needed.

18. When considering these offences, prosecutors are reminded that the proper interpretation of the law is primarily a matter for the courts and may involve the courts considering, among other things: (a) the scope of criminal offences (b) whether any implied defences may arise and/or (c) the range of remedies generally available to a court.

Express defences

19. Where an express defence is provided for - for example, that the conduct in question was in the public interest - prosecutors must consider what any public interest defence may be, and how it is likely to affect the prospects of conviction. In particular, when considering the sufficiency of evidence, prosecutors must be satisfied that there is enough reliable, credible, and admissible evidence to rebut any suggestion that the conduct in question was justified as being in the public interest. If not, there is unlikely to be a realistic prospect of conviction and the evidential stage of the Code test will not be met. When considering an express defence, the matters set out in paragraphs 31-35 below are likely to be relevant.

20. An example of an express public interest defence is to be found in section 55 of the Data Protection Act 1998, which creates the offence of obtaining, disclosing or procuring personal data. Section 55(d) provides a defence, namely: "that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest". Section 59 contains a similar provision in relation to the offence which it creates.

Cases where there is no express public interest defence

21. Among the offences which are most likely to be under consideration (see Annex A), a number have no express public interest defence. Where that is the case, prosecutors must ascertain whether the courts have already given clear guidance on the proper interpretation of any criminal offences which they may be considering. Where such guidance has been given, prosecutors must follow it

22. Although the provisions of the Official Secrets Act 1989 are primarily aimed at individuals who are subject to the Act or Crown servants, they may be relevant when prosecutors are

considering cases involving journalists or those who interact with them. The common law provides for secondary participation in crime, and sections 44 to 46 of the Serious Crime Act 2007 create offences of intentionally encouraging or assisting an offence; encouraging or assisting an offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed.

23. The Courts have given clear guidance that the public interest has little or no application in relation to sections 1(1)(a) and 4(1) and (3)(a) of the Official Secrets Act 1989 (*R v Shayler* [2002] UKHL 11). Therefore prosecutors should proceed on the basis that there is no public interest defence available to a suspect who is charged under these sections.

24. Clear guidance has also been given by the courts about the proper approach to the common law offence of misconduct in public office. In *AG's Reference No.3 of 2003* [2004] EWCA Crim 868, the Court of Appeal made it clear that not every act of misconduct by a public official is capable of amounting to a criminal offence. To attract criminal sanctions, the misconduct in question would normally have to amount to an affront to the standing of the public office held and to fall so far below the standards accepted as to amount to an abuse of the public's trust in the office holder. Prosecutors will have to consider carefully whether conduct which is in the public interest is capable of reaching that high threshold. Again although the offence of misconduct in public office is not primarily aimed at journalists, the common law on secondary participation and sections 44 to 46 of the Serious Crime Act 2007 may apply.

25. Where no express public interest defence is provided in legislation and clear guidance has not yet been given by the courts on the proper interpretation of the criminal offences under consideration, the best course for prosecutors may be to put the relevant facts and matters before the court for consideration (assuming that the evidential stage of the Code test is otherwise met). However, before doing so, prosecutors should go on to consider the separate question of whether a prosecution is required in the public interest, i.e. the second stage of the Code test.

Taking freedom of expression and the right to receive and impart information into account at the public interest stage

26. As noted above, under the Code for Crown Prosecutors, where there is sufficient evidence to prosecute, prosecutors must go on to consider whether a prosecution is required in the public interest.

27. The Code identifies a number of general factors which fall to be considered in every case when the public interest in prosecuting is considered. They should be applied in the usual way in cases affecting the media where freedom of expression and the right to receive and impart information are in issue.

28. However, the public interest factors in the Code are not exhaustive. When considering cases affecting the media in which freedom of expression and the right to receive and impart information are in issue, prosecutors should specifically go on to consider:

Whether the public interest served by the conduct in question outweighs the overall criminality?

29. This is likely to be a critical question. If the answer to it is yes, it is less likely that a prosecution will be required in the public interest.

30. When assessing whether the public interest served by the conduct in question outweighs the overall criminality prosecutors should follow the approach set out below. It is a three stage process: (1) assessing the public interest served by the conduct in question; (2) assessing the overall criminality; and (3) weighing these two considerations.

(1) Assessing the public interest served.

31. The public interest served by freedom of expression and the right to receive and impart information has never been defined in law. However, examples of conduct which is capable of serving the public interest include the following:

(a) Conduct which is capable of disclosing that a criminal offence has been committed, is being committed, or is likely to be committed.

(b) Conduct which is capable of disclosing that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which s/he is subject.

(c) Conduct which is capable of disclosing that a miscarriage of justice has occurred, is occurring or is likely to occur.

(d) Conduct which is capable of raising or contributing to an important matter of public debate. There is no exhaustive definition of an important matter of public debate, but examples include public debate about serious impropriety, significant unethical conduct and significant incompetence, which affects the public.

(e) Conduct which is capable of disclosing that anything falling within any one of the above is being, or is likely to be, concealed.

32. The list set out above is not intended to be exhaustive and other factors may be relevant in a particular case. Equally, the absence of any of the public interest factors set out above does not necessarily mean that no public interest is served by the conduct in question. Each case must be considered on its facts and merits.

(2) Assessing the overall criminality.

33. When assessing the overall criminality, prosecutors should focus on the conduct in question, the extent of the wrong-doing and the harm caused. Examples of factors likely to be relevant to the assessment include:

(a) The impact on the victim(s) of the conduct in question, including the consequences for the victim(s).

(b) Whether the victim was under 18 or in a vulnerable position.

(c) The overall loss and damage caused by the conduct in question.

(d) Whether the conduct was part of a repeated or routine pattern of behaviour or likely to continue.

(e) Whether there was any element of corruption in the conduct in question.

(f) Whether the conduct in question included the use of threats, harassment or intimidation.

(g) The impact on any course of justice, for example whether a criminal investigation or proceedings may have been put in jeopardy.

(h) The motivation of the suspect insofar as it can be ascertained (examples might range from malice or financial gain at one extreme to a belief that the conduct would be in the public interest at the other, taking into account the information available to the suspect at the time).

(i) Whether the public interest in question could equally well have been served by some lawful means having regard to all the circumstances in the particular case.

Again this list is not intended to be exhaustive and other factors may be relevant in a particular case. Each case must be considered on its facts and merits.

34. The first of these factors - the impact on the victim(s) of the conduct in question - is of considerable importance. In cases where the victim's privacy has been invaded, prosecutors are reminded that privacy is protected by law. Article 8 of the European Convention on Human Rights, which (like Article 10) has effect under the Human Rights Act 1998, provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence". Although this right is not absolute and may be restricted, restriction is only permitted where it is both necessary and proportionate.

35. Invasions of privacy can be keenly felt and can cause considerable distress to victims. Therefore, prosecutors should ensure that, where possible, information is obtained about the particular impact of the conduct in question on the victim(s), especially where any invasion of privacy appears to have been particularly intrusive. However, when considering invasions of privacy, regard must be given to the level of seriousness of the invasion, whether on the facts there was a reasonable expectation of privacy, and whether the conduct in question was proportionate to the public interest claimed to have been served.

(3) Making a decision

36. Having identified all relevant factors at the two stages set out above, prosecutors must go on to assess whether the public interest served by the conduct in question outweighs the overall criminality. If so, it is less likely that a prosecution will be required in the public interest.

37. Prosecutors are reminded that assessing whether a prosecution is required in the public interest is not an arithmetical exercise involving the addition of the number of factors on each side and then making a decision according to which side has the greater number. Rather, each case must be considered on its own facts and its own merits. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Even where there may be a number of public interest factors which tend against prosecution in a particular case, the prosecutor should consider whether the case should go ahead but with those factors being drawn to the courts attention so that they can be duly considered by the court.

38. Prosecutors should take special care in cases which involve the disclosure of journalists' sources. In approaching such cases, prosecutors are reminded that the European Court of Human Rights has indicated that: "Protection of journalistic sources is one of the basic conditions of press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect of an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. (Goodwin v UK (1996) 22 EHRR 123 paragraph 39; see also Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2003 and Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101).

39. That does not mean that prosecutions should never be brought where journalists may have to disclose their sources, but it does require prosecutors to give proper weight to the public interest in protecting journalists' sources when assessing whether the public interest served by the conduct in question outweighs the overall criminality.

40. Prosecutors are reminded that under section 10 of the Contempt of Court Act 1981, no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which s/he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

41. Before finalising a decision, prosecutors should ensure that the exercise of their discretion in deciding whether a prosecution is required in the public interest does not conflict with the approach taken by the courts to the particular offences that they have considered.

Handling arrangements

42. These guidelines came into effect on 13 September 2012.

43. All cases covered by these interim guidelines must be referred to the Special Crime and Counter Terrorism Division (SCCTD) in CPS HQ and notified to the Principal Legal Advisor to the Director of Public Prosecutions.

Annex A - Criminal offences most likely to be committed in cases affecting the media

Annex A lists the criminal offences most likely to be committed in cases affecting the media, the details of those offences and the penalty associated with them.